

U.S. Department of Labor

Board of Contract Appeals
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March 29, 2000

Case Nos.: 1997-BCA-4, 1999-BCA-2

Appeal of

BRERO CONSTRUCTION, INC.

Contract No.: E-4098-3-00-82-20

BEFORE: MILLER, LEVIN, AND VITTONI
Miller, Member, Board of Contract Appeals

**RULING ON NEED FOR CERTIFICATION OF APPELLANT'S
SECOND REVISED QUANTUM CLAIM FOR INDIRECT IMPACT COSTS
ON LABOR PRODUCTIVITY UNDER CHANGE ORDER PROPOSAL 222**

Introduction

The dispute immediately before the Board involves the formal demand of the Contracting Officer ("CO") by letter dated November 18, 1999, that Brero Construction, Inc. ("Brero" or "Appellant" or "the Contractor" or "BCI") certify a discrete portion of its currently pending consolidated claim pursuant to §6(c)(1) of the Contract Disputes Act of 1978, as amended ("CDA"), and submit the certified claim in its revised form to the CO for final decision. The claim for labor inefficiencies which is incorporated in Change Order Proposal ("COP") 222 is alleged by the CO to have been so modified that it is not the same claim that was initially submitted to the CO as part of Brero's certified Request for Equitable Adjustment ("REA") on November 14, 1997. Brero contends that recertification is not required under applicable law, because the claim is the same claim for labor inefficiencies that was originally submitted to the CO, and because the change in quantum merely reflects additional information obtained through "further analysis, research and discovery." Brero also contends that it would be prejudiced if it were required to recertify its second revised quantum claim. The Board finds that recertification of that second revised quantum claim under COP 222 and a final written decision by the CO are required before this Board can consider the merits of the claim.

The dispute arises in the context of a consolidated appeal under the CDA which relates to a multimillion dollar single lump sum construction contract, TMGP Contract No. E-4098-3-00-82-20, for construction and renovation of the San Jose Job Corps Center, San Jose California, ("the Contract"). The contract work comprised interior and exterior alterations and additions, including

demolition and renovation of existing buildings, and general construction, including mechanical and electrical work, of new buildings, including a dormitory, recreation building, and multipurpose building, and site work, including demolition, general site improvements, landscaping and irrigation, for the Owner, the U.S. Department of Labor ("DOL"). The notice to proceed was effective February 1, 1993. Modification No. 8 to the contract dated June 5, 1994, extended the period of performance for project closeout to November 4, 1994. (AF, Vol. I, Tab 4, p. 81.)

The initial appeal from the final written decision of the CO dated February 11, 1997, which was directed to all unresolved COP's to date, and which reconfirmed certain prior denials by the CO, including that of COP 222, was filed on May 5, 1997, and docketed as 97 BCA 4, (Appeal File ("AF"), Vol. I, Tabs. 2 & 3) By letter dated February 1, 1999, filed February 5, 1999, Brero filed an additional appeal of the Contracting Officer's Final Decision on Pass Through Claim Submitted by A&A Mechanical Contractors, Inc., in the amount of \$348,862.80, which was docketed as 99 BCA 2. This appeal was alleged by Brero to involve disputes related to reasonableness of price for work performed, changes, differing site conditions, and requests for equitable adjustments for work allegedly determined to be required under the contract and not required as a changed or differing site condition. This pass through claim, treated as a request for equitable adjustment, was denied in its entirety by the CO on November 16, 1998, because the causes upon which the claim was based were deemed to be attributable to Brero, not DOL, and that the claim was inadequately documented. The appeals were consolidated by order dated June 30, 1999.

Subsequently, by letter dated August 4, 1999, filed August 9, 1999, Brero filed an appeal from the Amended Final Decision of the Contracting Officer issued on June 22, 1999, which denied Brero's Revised Quantum claim for \$1,445,826.11 plus interest under the CDA and attorney fees pursuant to the Equal Access to Justice Act which had been filed by Brero on December 22, 1998. The Revised Quantum claim was based on a Time Impact Analysis ("TIA") contained in ten large looseleaf volumes of documents which Brero had submitted to the CO on October 9, 1998. This appeal was alleged by Brero to involve disputes related to reasonableness of price for work performed, changes, differing site conditions, and requests for equitable adjustments for work allegedly determined to be required under the contract and not required as a changed or differing site condition. It was treated, in effect, as an amendment of the pending claim docketed as 97 BCA 4.

There have been various discovery motions and motions for partial summary judgment which previously have been presented to and have required written rulings by the Board. Brero's extensive claims have been revised, and some claims have been resolved. The issues remaining in dispute, most of which are not immediately material, involve numerous and various types of claims for equitable adjustments, mainly under the Changes Clause of the Contract, for construction related work, and some claims under the Delay Clause, pursuant to numerous COP's under the Contract.¹

¹The Contracting Officer listed the twenty three items deemed to be in dispute in his pleading filed August 24, 1999. Some of these reflected aggregated COP claims.

The Contracting Officer's Demand for Certification

The "Contracting Officer's Reply to Appellant's Response to Board's Partial Summary of Prehearing Conference and Procedural Order Regarding Recertification of Revised Claim" ("CO's Reply") dated December 16, 1999, responds to Brero's contention that no recertification is necessary. The CO contends that Brero's second revised quantum claim under COP 222 for loss of productivity, which is dated September 20, 1999, constitutes a new claim which requires certification and a final decision by the CO pursuant to §6(c)(1) of the CDA. That claim superseded Brero's previous Loss of Productivity Analysis dated December 15, 1998. Brero's final Loss of Productivity Analysis purports to support a claim under COP 222 for \$697,826.80, including overhead and profit. (App. Exh. Bk. 18, Tab A-222).

Section 6(c)(1) of the CDA requires certification of claims in excess of \$100,000 to the effect that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

The CO demands certification of Brero's second revised quantum claim under COP 222 because that claim has undergone substantial revisions in amount and concept between November 14, 1997, when Brero first submitted COP 222 to the CO as part of its certified REA, and October 1 and 6, 1999, when Brero submitted its second revised quantum claim including the revised claim under COP 222. The CO concedes that recertification is unnecessary with respect to Brero's pending claims other than COP 222. Those claims have not so changed since their submission as to bring into question the validity of their certification under the REA. The Contracting Officer contends that the claims for labor inefficiencies, or indirect impact, under COP 222 should be recertified because of the extent of alleged changes in the basis of recovery, changes in the facts identified as underlying the claim, and changes in the documentation relied upon to support the claim. (CO's Reply, Exh. B, Declaration of John M. Steenbergen attached to CO's Reply)

Brero's Position

Brero contends that under applicable law, "revisions in the amount of damages in an appeal based upon the facts underlying the original claim do not constitute a 'new' claim requiring recertification," but, "if a revision in quantum is based upon different operative facts than the original claim is based upon rather than simply new information or proof of damages, then a 'new' claim exists which must be submitted to the Contracting Officer for a decision." Brero contends that it has not submitted a new claim to the CO, and that, contrary to the CO's allegations, the total amount claimed has actually decreased by \$46,950.23 from the REA to "the Final Quantum included in the trial Exhibits." Brero contends that it "has simply revised the quantum as submitted in the [REA] and [that] no change in the essential elements or basis of liability of the claim as initially submitted has been made."

Brero asserts that after submission of its certified REA on November 14, 1997, it submitted its TIA on October 9, 1998, to the CO, and that “[t]he TIA quantified and revised the number of impacted days the Brero was claiming against the Respondent.” On December 22, 1998, Brero submitted its Revised Quantum based upon the TIA findings, and revised the amount claimed. Then on July 17 and 22, 1999, after it received the previously withheld documents as discovery pursuant to Board order, Brero further adjusted its claims to accommodate that additional information. Brero contends that revisions in amount of damages were based upon the same facts and circumstances underlying the original claim as submitted in the REA, and that the revised damage claim is based upon further analysis, research, and discovery. Brero contends that the revisions in its Time Impact Analysis are not substantive changes, although the quantities have changed; that they represent further analysis, not new information; that the documents that the CO had most recently produced in discovery had provided the basis for the revisions when Brero allegedly discovered architect and engineer errors and omissions which resulted in the adjustment of claims related to preexisting individual COP’s and delay days in the TIA.

Brero contends, in substance, that the CO’s allegation that the revised COP 222 reflects a completely different analysis is based merely on the increase in the amount of the claim under COP 222 from \$356,941 to \$697,826. In this regard, Brero asserts, “The Respondent has conceded that most of the information contained in the revised [COP] 222 is not new but that re-certification is required because of the increased amount of the claim.” Brero contends that it has not changed its entitlement theory on appeal: it still seeks “damages for the indirect impact claims” as identified in the REA dated November 14, 1997. Brero also points out that the CO did not request recertification when Brero filed its Revised Quantum dated December 22, 1998, which reduced the total claim under COP 222 to \$356,941.² Brero suggests that, if recertification of this substantial claim is required, this Board could lose jurisdiction of the claim in issue. In addition, Brero could lose accrued interest on the claimed amount between the date of original certification and the date of recertification, if required.

The CO’s Position

The CO contends “that recertification is required since Brero is relying on different facts, a different basis for recovery and different documentation in its second revised claim under COP #222.” The earlier formulations were based on the difference between Brero’s planned labor costs for the project and actual labor costs for base contract work. The Contracting Officer contends that Brero’s second revised quantum claim represents the alleged indirect costs associated with the impact of COP’s on base contract framing work, not the direct costs of the change orders. Thus it involves different mathematical calculations and different costs. The CO contends that the analysis requires the identification of a baseline against which productivity can be measured, with appropriate adjustments for errors in estimating original project costs, contractor inefficiencies, and changes. The

²The Government may not be estopped by any asserted “waiver” by the CO of the statutory certification requirement under §6(c)(1) of the CDA. *See W. H. Moseley Co., Inc. v. United States*, 677 F.2d 850 (Ct. Cl. 1982).

analysis in support of such a loss of productivity claim must identify discrete areas where project activity was impacted and the hours required for units of work associated with those areas of work. The CO contends that such a presentation bears no similarity to the original claim under COP 222 in the REA which was calculated based on the difference between planned labor costs for the project, on the one hand, and labor costs for base contract work and the direct labor costs of change orders through Modification 9, on the other. (CO's Reply, Exh. B at 3)

The CO contends that the second revision of the claim replaced the original analysis in the Brero's Revised Quantum and resulted in an increase in the amount claimed from approximately \$356,000 to \$698,000. Brero has not elaborated, and in the CO's Reply the CO has not disputed Brero's assertion that the CO "has conceded that most of the information contained in the revised [COP] 222 is not new." Yet the significance, if any, of the assertion is not clear. The CO contends, in effect, that the significance of the information submitted has changed the focus of the claim to reliance upon design defects and a list of errors and omissions which purportedly effected changes in design, so that the information submitted by Brero reflects a substantial revision of the claim. The CO points out that, on the one hand, the documentation submitted in support of the certified claim under COP 222 in the REA was "meager," but that, on the other hand, Brero submitted four boxes of exhibits in support of its second revised quantum claim. He contends that the documentary proof related to the second revised quantum claim bears virtually no relation or similarity quantitatively or qualitatively to the earlier submissions under COP 222. The CO repeatedly cites the difference in the documentation submitted to support the initial certified claim under COP 222 and the subsequent second revised quantum formulation of that claim. He also points out that as part of its REA, for instance, Brero stated that the overrun in hours could be directly tied to various requests for information and COP's identified in the REA, and so it must be presumed that the references are to the twenty-four disputed COP's for which Brero had submitted documentation in its REA.

Findings of Fact and Conclusions of Law

The pertinent law holds that an initial certification remains valid so long as the claim under consideration is the "identical" or "same" claim as that which was the subject of the contracting officer's final decision. *See Tecom, Inc. v. United States*, 732 F.2d 935 (Fed. Cir. 1984); *cf. J.F. Shea Co. v. United States*, 4 Cl. Ct. 46 (1983). This does not mean that the amount(s) claimed cannot change on the basis of additional research, new information, changed circumstances, such as continued performance, or recalculation. *See Tecom, Inc. v. United States*; *J.M.T. Machine Co.*, ASBCA No. 24,298, 84-1 BCA ¶17,118; *Computer Sciences Corp.*, ASBCA No. 27275, 83-1 BCA ¶16452; *Burgett Investment, Inc.*, AGBCA Nos. 81-108-1, 81, 192-1, 83-2 BCA ¶16,695. But a claim is not the same claim if new elements have been introduced that were not considered by the contracting officer. *See Brinegar & Fuller, Inc.*, ASBCA No. 28427-42, 83-2 BCA ¶16,802; *SMS Data Products Group, Inc. v. United States*, 19 Cl. Ct. 612 (1990); *LDG Timber Enterprises, Inc. v. United States*, 8 Cl. Ct. 445 (1985). Nor would a certification normally apply to supporting data that was submitted after the certification was made. *See D.L. Braugher Co. v. West*, 127 F.3d 1476 (Fed. Cir. 1997). The essential factual premises and the theories of liability on which any pertinent claims are based must have been considered by the contracting officer in a final written decision. *See*

e.g. *SMS Data Products Group, Inc. v. United States*, 19 Cl. Ct. 612 (1990); *LDG Timber Enterprises, Inc. v. United States*, 8 Cl. Ct. 445 (1985). The parties appear to be in basic agreement as to the law, but disagree as to the application of the law to the operative facts of this appeal.

Brero's initial COP 222 was a claim filed on August 23, 1994, for costs allegedly attributable to labor inefficiencies experienced throughout the life of the project in the amount of \$753,148, including overhead and profit. The labor inefficiencies claimed were attributed generally to disruptions caused by the Department of Labor ("DOL"). A copy of that COP 222 as originally submitted to the CO is attached as Exhibit A. The claim thus originally submitted consisted of only a general inventory of alleged kinds of contract mismanagement by DOL described in broad categories such as, "[r]equests for clarification and requests for information were not responded to in a timely manner," and, "[s]ignificant changes in scope of work were made to the existing buildings." The labor inefficiencies complained of were neither more specifically identified, nor supported by documentation. Declaring that its projected labor costs for the project were \$836,190, that Brero had well established cost controls and history, and that the difference between the projected costs and its labor budget through Modification 9 of \$1,458,626 reflected the inefficiencies listed, Brero requested issuance of a COP for \$753,148.00 for Labor (including burden), ten percent overhead and ten percent profit.

The amount of the claim was calculated simply by subtracting labor costs incorporated in Brero's contract bid from total labor costs allegedly incurred in performance of the contract. This submission apparently was not certified. (AF, Vol. IV, Tab 19) Brero apparently does not dispute the CO's assertion in his October 11, 1994, response to the claim that the claim was not supported by documentation, and, therefore, could not be evaluated.³ Substantial completion of the project occurred on October 18, 1994. In a letter dated June 27, 1995, the CO indicated, among other things, that COP 222 had been previously denied and that no new information had been presented. (Appellant's REA, Tab. COP 222)

On October 11, 1995, Brero notified the CO that it would submit an omnibus request for an equitable adjustment. However, a year and four months later, on February 11, 1997, when Brero had not submitted any additional supporting documentation, the CO issued a Final Decision which purported to decide all unresolved COP's. That Final Decision included a confirmation of the prior denial of COP 222 as submitted in the absence of any new information to support a change in the CO's position. (AF, Vol I, Tab 3, p. 8-14) The first paragraph of that letter acknowledged that DOL had been put on notice of Brero's intent to file an "Omnibus Request for Equitable Adjustment" in a letter dated October 11, 1995, but stated that no new information had been provided. (*Id.* at p. 8.)

On November 14, 1997, Brero submitted its Request for Equitable Adjustment ("REA"). This submission incorporated substantially the same claim that had been submitted on August 23,

³CO's Reply, Exh. A. It is not clear why this document is not a readily accessible component of the Appeal File, which would be part of the evidentiary record pertinent to the claim.

1994, as COP 222 for labor inefficiencies in the amount of \$753,148. (Appellant's REA, Tab. COP 222; Appellant's Exh. A242) This claim was certified on November 14, 1997, under the umbrella REA claim for \$1,815,454.11. (Appellant's REA, Tab Certification; Appellant's Exh. A242) The amount of the claim was unchanged from the original COP 222 submitted to the CO on August 23, 1994. The same differential between Brero's projected labor costs and incurred costs through Modification 9 was cited as the basis for the amount of the claim. Brero restated the inventory of generalized categorical complaints in the same order, but somewhat abbreviated. In addition, it suggested that there had been constructive acceleration as a result of "performing work out of sequence, increasing crew size, crowding and stacking of trades and diverting supervision and labor from base contract work."

In the REA Brero announced that it had retained a consultant to undertake a time impact analysis of the project for the presentation of an "Omnibus Request for Equitable Adjustment," but that the TIA had not yet been completed. Brero then declared,

The time impact analysis effort to date has demonstrated that significant labor inefficiencies were encountered on the project as a result of the afore listed actions and inactions by the DOL on the project. The time impact analysis effort undertaken by the consultants has generated an Impacted As Built Schedule for building F which identifies the COP which impacted this activity. A copy of the Brero Construction, Inc. Impacted As Built Schedule will be presented during the negotiations scheduled on November 14, 1997.

The time impact analysis has also demonstrated the labor inefficiencies encountered on the project as a result of the actions and inactions by the DOL on the project. Enclosed under this Request for Equitable Adjustment section are demo labor hours graphs for buildings E, F, G and H as well as framing labor hour graphs for buildings N, M, L3, L1, H, and F. The graphs demonstrate the planned hours per the schedule and actual hours expended by BCI on the project. As is demonstrated by the graphics, the actual hours expended on the demolition and framing greatly exceeded the planned hours.

This overrun in hours resulted from the actions and inactions by the DOL. These overruns can be directly tied to the various RFI's and COP's identified in this Request for Equitable Adjustment.

Attached were eleven colored graphs purporting to plot comparative labor hours planned and expended on particular dates with respect to particular buildings. A copy of one such graph is attached as exhibit B. No particular activities or dollar amounts were identified. Thus, these computer graphics, while they purport to illustrate by additional means Brero's assertion that there is a substantial differential between planned and actual labor hours expended, do not add either meaningful particularity or substance to the claim as previously framed and submitted. The only other documentation of the claim submitted in the REA under COP 222 was a copy of the August 23,

1994, COP 222, together with Brero's followup negotiating proposal to the CO dated March 10, 1995, listing COP's and proposed settlement amounts, and the CO's response of June 27, 1995, which included a reiteration of the denial of COP 222 in the absence of additional supporting information. (Appellant's REA, Tab COP 222)

Because the dollar amount of the claim under COP 222 was unchanged, it must be assumed that this submission did not represent a substantial change in the essential underlying facts and theory of the claim from that originally presented to the CO on August 23, 1994. The REA used the same total labor cost method as the initial submission of COP 222 dated August 23, 1994, to calculate the amount of its claim. It did somewhat expand the description of the basis of the claim by introducing the computer graphics associating labor hour differentials with demolition and framing hours related to particular buildings and construction activities which had not been previously identified in the general categorical listing of causes for the alleged labor inefficiencies. However, the claim under COP 222 incorporated in the REA as thus presented is essentially the same claim that was previously submitted under COP 222 and denied by the CO nine months earlier in his Final Decision on February 11, 1997. The dollar amount of the claim was the same; the categorical inventory of labor inefficiencies was essentially the same, and the supporting documentation was essentially the same except for the computer graphics which could not be linked to any particular changes or omissions or dollar amounts. Thus, the claim under COP 222 which was certified pursuant to §6(c)(1) was extremely limited in its particularity and scope, and it included virtually no supporting documentation.

Almost a year after its submission of the REA, on October 9, 1998, Brero filed a ten volume TIA. On December 22, 1998, Brero filed its Revised Quantum, decreasing the claim relative to COP 222 from \$753,148 to \$356,941. This submission was not accompanied by a separate certification of the claim. (Appellant's Exh. A243) Subsequently, on October 6, 1999, almost a year later, Brero filed a second revised quantum claim pertaining in part to COP 222, allegedly based on the identification of errors and omissions of the architects and engineers disclosed by documents obtained in July 1999. This submission increased the amount of the claim under COP 222 to \$697,826.80. (Appellant's Exh. Bk. No. 18, Exh. A-222) Brero then withdrew the Revised Quantum as superseded and not to be considered further.

Brero's exhibit comprising the second revised quantum claim contains the Loss of Productivity Analysis (Final), and is declared by Brero to supersede the previous Loss of Productivity Analysis dated December 15, 1998. It is said by Brero to be based on its accounting records retrieved from storage and recently obtained discovery documents. This exhibit adds a large amount of new detailed material, purportedly to support the claim, which is presently contained in four sizeable storage boxes. This material was clearly not identified under the REA certification in general or in relation to COP 222. The CO denies having previously evaluated it in connection with the claim under COP 222 as finally framed. The CO also correctly asserts that this claim and documentation were submitted approximately two years after the submission of the claim certified on November 14, 1997.

Since it is not elaborated, the precise meaning, purpose, and intended effect of Brero's

assertion, that the CO has conceded that most of the information contained in the revised COP 222 is not new, is not clear. However, it can be inferred, to the extent that the assertion might be material, that the documentation which Brero has now submitted in support of its second revised quantum claim under COP 222 relates generally to the twenty-four unresolved COP's which comprise the second revised quantum claim, or possibly the documentation submitted in support of the claims under the more than two hundred COP's previously presented to the CO. Since COP 222, among others, had been consistently denied in prior final decisions of the CO on the grounds of lack of supporting information or documentation, it may be inferred that the documentation submitted in relation to COP 222 as part of Brero's second revised quantum claim had not been previously submitted for the purpose of claiming costs for labor inefficiencies under COP 222, rather than to claim direct costs identified in the COP's themselves. The fact that documentation may have been submitted to the CO for consideration or review in some other context not clearly related to COP 222, does not vitiate our conclusion that the claim is separate and distinct from Brero's other certified claims. It is clear from the course of dealings and record so far developed in respect of this claim, that the documentation incorporated in the TIA and submitted with additional documentation as part of the second revised quantum claim has not been certified or submitted to the CO in relation to the second revised quantum claim as now fundamentally detailed and restructured.

Thus, the Board concludes that the second revised quantum claim, as it relates to the labor inefficiencies claimed under COP 222 constitutes a new claim that is not the same as, or identical to, that claim originally submitted on a total cost theory to the CO on August 23, 1994, or that claim as incorporated with the computer graphics into REA filed November 14, 1997, which was certified as part of the entire claim submitted at that time. This substantially revised claim has significant and substantial new elements, purportedly based on hitherto undisclosed or previously unspecified facts. The basic theory and the elements of this second revised quantum claim, together with what purports to be the supporting documentation, have not been certified and submitted to the CO for a final decision as required by the CDA. The fact that this claim reflects an increase in the amount claimed since the original certification of the November 14, 1997, REA, is only one consideration, and is not determinative, although, because of the size of the increase, it tends to corroborate the inference that the claim has substantially changed. Under such circumstances the Board must conclude that, at the very least, the certification that accompanied the REA pertained to supporting data which was neither accurate nor complete in relation to the claim now before us as Brero's second revised quantum claim.

Conclusion

Since Brero has presented a different theoretical basis, and differing or initially specified facts, which, if they were underlying the claim in its previous incarnation, were not sufficiently disclosed as such, the Board concludes that the substance of the claim underlying COP 222 as finally presented as part of Brero's second revised quantum claim, together with its underlying explanatory and supporting documentation, must be certified as required by the Act. Because the COP 222 claim with its general allegations and few and simple related graphs, which was submitted as a component of the REA, bears little, if any, resemblance to the second revised quantum claim as finally submitted in

form, amount, substance, or documentation, there is no injustice in requiring a certification which would establish a new base date for the accrual of interest with respect to that claim.

ORDER

Appellant's second revised quantum claim under COP 222 for loss of productivity dated September 20, 1999, must be certified and submitted to the CO for a final written decision under the Act. Until that is done, the Board is without jurisdiction to decide Brero second revised quantum claim under COP 222.

John M. Vittone, Chairman

Stuart A. Levin, Member

Edward Terhune Miller, Member